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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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**No. 1096 83**

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INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY, ERIE RAILROAD COMPANY AND JAMES THOMPSON,

*Appellants,*

*vs.*

WILLIAM SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, AND THE TOWNSHIP OF SADDLE RIVER

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APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

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## STATEMENT AS TO JURISDICTION

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# INDEX

## Subject Index


| | Page |
|---|---|
| Statement as to jurisdiction | 1 |
| Statutory provisions sustaining jurisdiction | 1 |
| Statute of the State the validity of which is involved | 3 |
| Dates of the judgment and application for appeal | 5 |
| Statement showing the nature of the case, grounds upon which it is contended that the questions are substantial and the stages in the proceedings at which, and the manner in which, the Federal questions were raised | 5 |
| Appendix "A"—Opinion of the New Jersey Court of Errors and Appeals | 34 |
| Appendix "B"—Opinion of the New Jersey Supreme Court | 45 |


## Table of Cases Cited


| | |
|---|---|
| *Abilene & S. R. Co., In re*, 148 I. C. C. 316 | 23 |
| *Baltimore & Ohio Railroad Co.* v. *United States*, 24 Fed. Supp. 734 | 27 |
| *B. & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166 | 27, 28 |
| *Blodgett Milling Co.* v. *Chicago, M. & St. P. Ry. Co.*, 23 I. C. C. 448 | 23 |
| *Central R. Co.* v. *United States*, 257 U. S. 247 | 24, 27 |
| *Central Yellow Pine Assn.* v. *Vicksburg, S. & P. R. Co.*, 10 I. C. C. 193 | 23 |
| *Cleveland, C., C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588 | 24 |
| *Elevation Allowances at Kansas City*, 34 I. C. C. 442 | 23 |
| *Elevation Allowances at St. Louis and East St. Louis*, 30 I. C. C. 696 | 23 |
| *Grand R. & I. Ry. Co.* v. *United States*, 222 Fed. 577, 234 U. S. 762 | 23, 27 |
| *Great Northern Ry. Co.* v. *Minnesota*, 278 U. S. 503 | 2 |
| *Hospital* v. *Cass County*, 90 L. Ed. 2 | 2 |

| | Page |
|---|---|
| *Independent Warehouses, Inc.*, v. *Scheele*, 132 N. J. L. 390 | 18 |
| *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41 | 24 |
| *King Mfg. Co.* v. *Augusta*, 277 U. S. 100 | 2 |
| *Marsh* v. *Alabama*, 90 L. Ed. 227 | 2 |
| *Merchants Warehouse Co.* v. *U. S.*, 283 U. S. 501 | 24 |
| *Nashville, C. & St. L. Ry. Co.* v. *White*, 278 U. S. 456 | 2 |
| *Pattison & Bowns* v. *Township of Saddle River*, 129 N. J. L. 135, 130 N. J. L. 177 | 29 |
| *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291 | 23 |
| *Railroad Ret. Brd.* v. *Duquesne Warehouse Co.*, 90, L. Ed. 202 | 24 |
| *Rates & Charges on Grain and Products*, 91 I. C. C. 105 | 23 |
| *Southern Pac. Term. Co.* v. *I. C. C.*, 219 U. S. 498 | 24 |
| *Southern Ry.* v. *Prescott*, 240 U. S. 632 | 24 |
| *Southern Ry.* v. *Reid*, 222 U. S. 424 | 24 |
| *Texas Steel Co.* v. *Missouri K-T R. Co.*, 225 I. C. C. 337 | 27 |
| *Thomas Keery Co., Inc.*, v. *New York, O. & W. Ry. Co.*, 226 I. C. C. 335 | 27 |
| *Tucker* v. *Texas*, 90 L. Ed. 235 | 2 |
| *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208 | 24 |
| *United States* v. *Wabash R. Co.*, 321 U. S. 043 | 24 |
| *Western Turf Association* v. *Greenberg*, 204 U. S. 359 | 2 |
| *Wheelock & Bierd* v. *Akron, C. & Y. Ry. Co.*, 179 I. C. 517 | 27 |
| *Zucht* v. *King*, 260 U. S. 174 | 2 |


STATUTES CITED


Constitution of the United States, Article I, Section 8, Clause 3 ..... 21, 26, 33

Interstate Commerce Act:

Section 1, paragraphs (3) and (4) ..... 6

Section 6, paragraphs (1), (3), (4), (5), (6), (7), (10) ..... 6

Page

Judicial Code, Section 237(a) (28 U. S. C. A., Sec. 344a) 2
Ordinance of the Township of Saddle River of January 25, 1943 3
Revised Statutes of New Jersey:
Title 14, Chapter 15 29
Title 54, Chapter 4, Section 19 29
Titles 19 to 29, Sec. 54:20-2 28
U. S. Code, Title 49:
Section 1, paragraphs (3) and (4) 6
Section 6, paragraphs (1) and (4) 6

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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## No. 1096

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INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY, ERIE RAILROAD COMPANY AND JAMES THOMPSON,

*Appellants,*

*vs.*

WILLIAM SCHEELE, RECORDER OF THE TOWNSHIP OF SADDLE RIVER, AND THE TOWNSHIP OF SADDLE RIVER

---

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

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## STATEMENT OF JURISDICTION

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The basis upon which Appellants contend that this court has jurisdiction upon appeal to review the final judgments in question, dated March 7th, 1946, of the New Jersey Court of Errors and Appeals, which is the highest court in the State of New Jersey in which a decision can be had, are hereinafter set forth:

1. The provisions of the Judicial Code which confer jurisdiction upon the Supreme Court of the United States are

Section 237(a) (28 U. S. C. A., Sec. 344(a)), reading as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Some of the decisions in which the Supreme Court of the United States has sustained its jurisdiction, under the above quoted Section 237(a), of the Judicial Code, on appeal from judgments of the highest state courts, are *Western Turf Assn.* v. *Greenberg*, 204 U. S. 359, 362 (pgf. 1); *Nashville, C. & St. L. Ry. Co.* v. *White*, 278 U. S. 456, 460; *Great Northern Ry. Co.* v. *Minnesota*, 278 U. S. 503, 506. Some of the cases decided in the present term of the Supreme Court of the United States in which it has assumed, without question, like jurisdiction are *Hospital* v. *Cass County*, 90 L. Ed. Adv. Op., pp. 2, 3, —— U. S. ——; *Marsh* v. *Alabama*, 90 L. Ed. Adv. Op. 227, 228, —— U. S. ——; *Tucker* v. *Texas*, 90 L. Ed. Adv. Op. 235, —— U. S. ——.

For the purposes of these provisions of the Judicial Code, the word "statute" includes a municipal ordinance, *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 114; *Zucht* v. *King*, 260 U. S. 174, 176.

2. The "statute" of the State, the validity of which is here involved, is a municipal ordinance, adopted January 25, 1943, by the Township of Saddle River, a municipal subdivision of the State of New Jersey, located in Bergen County, which ordinance reads as follows:

"TOWNSHIP OF SADDLE RIVER,

Bergen County

An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which said Business is Conducted and Carried on, to Prescribe Fees for such Licenses, and to Provide Penalties for the Violation of this Ordinance.

Be It Ordained by the Township Committee of the Township of Saddle River, in the County of Bergen:

1. Within the limits of the Township of Saddle River, no person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on.

2. Said license shall be applied for by written application filed with the Township Committee. Such application shall set forth the full name and address of the applicant, the kind or character of personal property to be stored, the location of the place and

premises in or at which the business is to be conducted, the total area of the ground space thereof and a diagram of the same. Said application shall also be accompanied with a deposit to cover the license fee for the current year in the amount hereinafter provided.

3. There shall be charged and collected for said license an annual fee to be computed on the basis or rate of three-quarters of a cent (3/4 of 1¢) for each square foot of the total ground area of the place and premises in the Township of Saddle River in or at which said business is conducted or carried on. Said license shall expire on January first of each year. Said license fee shall be payable in advance for each year or part thereof and is hereby expressly declared to be imposed for revenue. The Township Committee may revoke any such license for sufficient cause after notice and hearing.

. . . . . .

7. Any person, firm or corporation who shall violate any term or provision of this ordinance shall upon conviction thereof be subject to imprisonment in the County Jail or in any place provided by the Township of Saddle River for the detention of prisoners, for a term not exceeding ninety (90) days or to a fine not exceeding Two Hundred Dollars ($200.00), or both. Any person so convicted may, in the discretion of the Magistrate by whom he was convicted, in default of the payment of any fine be imprisoned in the County Jail or place of detention provided by the Township of Saddle River, for any term not exceeding ninety (90) days: There may issue out of the court of any Magistrate empowered to impose fines for the violation of this ordinance execution against the goods and chattels of any person, firm or corporation convicted in such court or before such Magistrate. Execution shall be levied and enforced in the same manner as are executions from the small cause court. Each day that a violation of any of the terms or provisions of this

ordinance shall continue shall constitute a separate offense.

8. In the event that any section or part of this ordinance shall be held illegal or unconstitutional such invalidity shall not be construed as impairing the force and effect of the remainder of the ordinance.

9. All ordinances or parts of ordinances inconsistent with this ordinance are hereby repealed as to such inconsistent provisions and this ordinance shall take effect after publication in the manner provided by law."

3. The date of the judgment sought to be reviewed is March 7th, 1946, and the date upon which the application for this appeal was made is March 13, 1946.

4. The following paragraphs show:

(a) That the nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions;

(b) A statement of the grounds upon which it is contended that the questions involved are substantial;

(c) The specific stages in the proceedings in the court of first instance and in the reviewing court and the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them by motion to dismiss the proceedings, by "Reasons" (equivalent to assignments of Error) filed in the New Jersey Supreme Court; and the Grounds of Appeal filed by appellees in the New Jersey Court of Errors and Appeals, and the way in which they were passed upon by the several courts; with pertinent quotations of specific portions of the record, or a summary thereof, with specific places in the record where the matter appears, as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provisions believed to confer jurisdiction on

this court. Record references ("R") herein are to the pages of the printed "State of Case" in the New Jersey Court of Errors and Appeals, and the typewritten opinion of that court endorsed: "Filed Jan. 31, 1946, J. A. Brophy, Clerk" received by appellants from said Clerk on February 7, 1946; a true copy of which is attached hereto. Reference herein to the corporate appellants are as follows; Independent Warehouses, Inc. is hereinafter called "Independent"; Pennsylvania Coal Company is hereinafter called the "Coal Company"; Erie Railroad Company is hereinafter called "Erie."

5. Erie is a corporation of the State of New York, a common carrier by railroad, engaged in the transportation of freight, including anthracite coal, in interstate commerce and is subject to the Acts of Congress regulating interstate commerce customarily designated as the Interstate Commerce Act, as amended, and the jurisdiction of the Interstate Commerce Commission. In the performance of its duties as a common carrier, and as required by the provisions of the Interstate Commerce Act, it provided various transportation facilities and services for the transportation and handling of anthracite coal, moving exclusively in interstate commerce under through tariff routes and joint rates, including (from and after February 25, 1939) stop-over privileges at Coalberg, exclusively for the in-transit storage and servicing of interstate shipments of anthracite coal under duly published and filed tariffs prescribing the rates, rules, regulations, and practices governing said in-transit storage facilities and services, pursuant to the provisions of Section 1 paragraphs (3) and (4), and Section 6, paragraphs (1) and (4) of Title 49 USCA). It maintained at a place called Coalberg in the Township of Saddle River, Bergen County, New Jersey, a tariff designated freight station for the handling of all transportation business, and maintained at said station

its duly appointed agent who collected and remitted directly to Erie all charges, accruing under said tariffs for the transportation, storage and other services, on all coal received at, stored in transit, or moving out of, said station. Said storage-in-transit facilities and services were performed for Erie, under written contracts, by Independent and the Coal Company solely as agents, and at the sole expense of Erie.

6. The Coal Company is a corporation of the Commonwealth of Pennsylvania and owns certain lands in the Township of Saddle River upon which it had erected and maintained the necessary tracks, equipment, and machinery for unloading, storage, reloading and other servicing of interstate shipments of coal stored in-transit under a railroad tariff. As contract agent, and at the sole expense, of Erie, it operated said tracks, equipment and machinery, exclusively for unloading, reloading and servicing of such coal owned by shippers, enroute in interstate commerce, under through shipping contracts and tariffs moving under through routes and joint rates from mines in Pennsylvania to ultimate destinations in other states.

7. Independent is a corporation of the State of New York, authorized to transact business in the State of New Jersey, and was, when these actions arose, exclusively engaged at a tariff railroad station designated as "Coalberg" in the Township of Saddle River, Bergen County, New Jersey, solely as agent of Erie, in the storage-in-transit, during stop-over periods under rates, rules, regulations and practices published in a duly filed railroad tariff, of shipper-owned anthracite coal moving exclusively in interstate commerce via through routes and at joint rates.

8. Appellant, James Thompson, was employed at Coalberg in connection with said transportation and storage-in-transit facilities and services.

9. On January 25, 1943, Appellee, Township of Saddle River adopted the above mentioned municipal ordinance.

"TOWNSHIP OF SADDLE RIVER

Bergen County

An Ordinance to Regulate and License the Business of the Storage of Personal Property in Warehouses Engaged in the Business of Storing Goods for Hire and the Place or Premises in or at Which Said Business is Conducted and Carried on, to Prescribe Fees for Such Licenses, and to Provide Penalties for the Violation of This Ordinance.

Be it ordained by the Township Committee of the Township of Saddle River, in the County of Bergen:

1. Within the limits of the Township of Saddle River, no person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted and carried on.

2. Said license shall be applied for by written application filed with the Township Committee. Such application shall set forth the full name and address of the applicant, the kind or character of personal property to be stored, the location of the place and premises in or at which the business is to be conducted, the total area of the ground space thereof and a diagram of the same. Said application shall also be accompanied with a deposit to cover the license fee for the current year in the amount hereinafter provided.

3. There shall be charged and collected for said license an annual fee to be computed on the basis or rate of three-quarters of a cent (¾ of 1¢) for each square foot of the total ground area of the place and premises in the Township of Saddle River in or at which said business is conducted or carried on. Said license shall expire on January first of each year. Said license fee shall be payable in advance for each year or part thereof and is hereby expressly declared to be imposed for revenue. The Township Committee may revoke any such license for sufficient cause after notice and hearing.

. . . . . .

7. Any person, firm or corporation who shall violate any term or provision of this ordinance shall upon conviction thereof be subject to imprisonment in the County Jail or in any place provided by the Township of Saddle River for the detention of prisoners, for a term not exceeding ninety (90) days or to a fine not exceeding Two Hundred Dollars ($200.00), or both. Any person so convicted may, in the discretion of the Magistrate by whom he was convicted, in default of the payment of any fine be imprisoned in the County Jail or place of detention provided by the Township of Saddle River, for any term not exceeding ninety (90) days. There may issue out of the court of any Magistrate empowered to impose fines for the violation of this ordinance execution against the goods and chattels of any person, firm or corporation convicted in such court or before such Magistrate. Execution shall be levied and enforced in the same manner as are executions from the small cause court. Each day that a violation of any of the terms or provisions of this ordinance shall continue shall constitute a separate offense.

8. In the event that any section or part of this ordinance shall be held illegal or unconstitutional such invalidity shall not be construed as impairing the force and effect of the remainder of the ordinance.

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9. All ordinances or parts of ordinances inconsistent with this ordinance are hereby repealed as to such inconsistent provisions and this ordinance shall take effect after publication in the manner provided by law."

10. On November 30, 1943 Independent and James Thompson were arraigned before Appellee William Scheele, as Recorder of the Township of Saddle River, on complaints of the Chief of Police of said Township, verified April 15, 1943, and warrants returned November 30, 1943, and, after pleading not guilty, they were tried in a joint hearing and on a joint record, and each convicted of violation of said ordinance "at a certain place called Coalberg, appearing on the Assessment Map as Block No. 106 D" in said Township (R. 4-12, 21).

11. Independent was convicted on the charge that on April 12, 1943, it—

> "conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire without there having been granted by the Township Committee of the Township of Saddle River a license, which was then and there in force and effect, to conduct said business for the place and premises in or at which said business was conducted and carried on, in violation of Section 1 of an ordinance" (reciting the title of the ordinance above set forth).

12. James Thompson, an employee, was convicted on the charge that on April 14, 1943, he "worked in, occupied or utilized" the same place or premises.

13. Said Recorder, Appellee William Scheele, imposed upon Independent and James Thompson, each a fine of $200 and directed that, for the enforcement of the fine imposed on Independent—

> "There may issue execution against the goods and chattels of the said defendant Independent Ware-

houses, Inc. to be levied and enforced in the same manner as are executions from the Small Cause Court."

Said Recorder directed that, for the enforcement of the fine imposed on James Thompson, in default of the payment, he "be imprisoned in the County Jail for a term of ninety days (90)".

14. Block 106-D on the Assessment Map of said Township, specified in said complaints and convictions, respectively, as the place or premises in or at which Independent and James Thompson were alleged to have violated said ordinance, comprises a total area of 2,730,296 square feet. Of that total area 462,350 square feet were occupied exclusively by railroad yard tracks and switch connections, with appurtenant wells, water tank, and pumps for supplying water to railroad locomotives, locomotive shed and engine house, power lines and poles for illuminating the railroad yard, and railroad track scales; all of which were used for general railroad purposes, including track access to the transit storage facilities. Of said total area, 574,268 square feet were occupied by floors and pits used solely for the in-transit storage of coal, with appurtenant equipment and machinery for unloading from, and reloading to, railroad cars. The remainder of said total area was unoccupied and unused. At the rate of ¾ of one cent per square foot provided in section 3 of said ordinance, the *annual* license fee for the total area of Block 106-D would amount to $20,475, which is the exact amount of the assessed valuation of that total land area, upon which said Township of Saddle River levied and collected real property taxes for the year 1943; the year of the alleged violation of said ordinance for which Independent and James Thompson were convicted (Exhibits P-1, P-2, and P-3; R. 26-28).

15. At the joint hearing held before Appellee, William Scheele, Recorder of Saddle River Township on November 30, 1943, on the complaints filed against Independent and James Thompson, respectively, which was the initial proceeding in this litigation, their attorney filed on their behalf a written joint motion to dismiss the complaints against them, respectively, upon the following specified grounds, which drew in question the validity of said ordinance, as applied to the conduct of said in-transit storage as applied to the business at Coalberg, as repugnant to the constitution and laws of the United States (R. 17-20).

"1. The ordinance upon which the complaint is based is not a valid exercise of any licensing power of the Township of Saddle River, but is a devise to obtain public revenue from the storage of coal in the Township in a particular instance, in lieu of personal taxes on the coal stored which is exempted from taxation by law.

2. The total ground area of the place and premises in the Township of Saddle River in or at which Independent Warehouses, Inc. conducts or carries on the business of storing coal for hire, is 67.25 acres or 2,929,410 square feet and the annual license fee required to be paid by that company, computed on that area at the rate of three-quarters of a cent for each square foot, as prescribed by said ordinance, amounts to over $20,000. Such license fee is greatly in excess of any total annual earnings that Independent Warehouses, Inc. could obtain from the business of the storage of coal on said premises, and the annual license fee is arbitrary, unreasonable, prohibitory and confiscatory.

3. The business of storing coal for hire by Independent Warehouses, Inc. at the above mentioned place or premises in the Township of Saddle River, consists of the storage of coal shipped from coal mines outside of the State of New Jersey over the railroad of the

Erie Railroad Company, an interstate carrier by steam railroad, under joint tariffs filed by it and other railroad companies with the Interstate Commerce Commission of the United States, which provide for the transportation of the coal to and from the above mentioned coal storage plant used by Independent Warehouses, Inc., for the purpose of its business, under through rates from the point of origin of the shipment to the ultimate destination of the coal, the handling of the coal into and out of the coal storage plant and for storage of the coal therein. The coal stored at said coal storage plant is in the course of transportation in interstate commerce. The license fee required by the aforesaid licensing ordinance of the Township of Saddle River is unreasonable, arbitrary and prohibitory and imposes taxes, regulations, restrictions and burdens upon interstate commerce.

4. Said ordinance purports to be for the purpose of licensing the business of storing personal property for hire in the Township of Saddle River, but erroneously imposes penalties upon persons, firms and corporations who work in, occupy or, directly, or indirectly in any manner whatsoever utilize any place or premises in which such business is carried on unless and until a license under the ordinance has been granted by the Township, notwithstanding such persons, firms and corporations are not engaged in conducting or carrying on the business and are not responsible therefor.

5. The ordinance was passed by the Township Committee of the Township of Saddle River on January 25, 1943, and provides for an annual license fee, payable in advance and that the license shall expire on January first of each year. Therefore, no license is required by the ordinance for any period prior to January 1, 1944.

6. Said ordinance deprives Independent Warehouses, Inc. of its property without due process of law and denies it the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of

the United States and imposes taxes, regulations, restrictions and burdens upon interstate commerce in violation of the commerce clause of the Constitution of the United States and the Acts of Congress to regulate commerce.

7. Said ordinance is, for the reasons above stated, or one or more of them, and in other respects, irregular, defective, unlawful, unconstitutional and illegal.

The defendant James Thompson moves to dismiss the complaint against him on the grounds above stated and on the further ground that on the date mentioned in the complaint he was not responsible for conducting or carrying on the business of the storage of personal property in a warehouse for hire in the Township of Saddle River and can not be lawfully charged with a violation of the aforesaid licensing ordinance of the Township."

16. On December 13, 1943, writs of certiorari, identical except as to the name of the prosecutor, were allowed by the New Jersey Supreme Court to Independent and James Thompson, respectively, as prosecutors, to review the record and proceedings before the Recorder respecting their convictions (R. 1-2).

17. On December 14, 1943 an order was entered in the New Jersey Supreme Court, reciting an application on behalf of the Coal Company and Erie for leave to intervene in the proceedings on the writ of certiorari allowed to Independent; said order further recited:

"and it further appearing from their verified petition presented on this date, that a decision of this court upon said writ may affect adversely the interests of said Pennsylvania Coal Company and Erie Railroad Company, and upon good cause being shown,"

and ordered that the Coal Company and Erie—

"be, and they are hereby, made parties to this action on the side of the prosecutor,"

Said order further provided that their names be added to the writ of certiorari allowed therein; that they, and each of them be given notice of further proceedings; and allowed to take depositions under said writ, which shall constitute part of the record before the court upon the consideration of said writ (R. 2-3).

18. On April 22, 1944, the attorneys for all of the prosecutors and defendants under both of said writs of certiorari stipulated and agreed as follows:—

> "that the proceeding on the writs of certiorari in the above entitled cases, respectively, be presented to the court in one joint record, and that, with the court's approval, they be briefed and heard together" (R. 25).

Thenceforward the proceedings resulting from said writs of certiorari have been presented in one joint record, and these cases have been briefed and heard together in, and with the approval of, the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals.

19. On January 10, 1944, appellants in the above entitled causes, who were prosecutors before that court, filed their "Reasons" in the New Jersey Supreme Court for the reversal and setting aside the proceedings and judgments of convictions of Independent and James Thompson, brought before that court by said writs of certiorari, on certain grounds therein specified that said proceedings and judgments of conviction, and the ordinance under which they were convicted, were invalid, unlawful, unconstitutional and illegal, in this instance, including the following grounds which drew into question the validity of said ordinance, on the ground that said ordinance, and convictions, were repugnant to the Constitution and laws of the United States (R. 22-25).

> "(a) The ordinance is not a valid exercise by the Township of Saddle River of any licensing power or

authority it may have, but is a device of the Township to obtain public revenue from the prosecutors, or one of some of them, in lieu of personal taxes on certain coal stored in the Township which is exempted by law from taxation.

(b) The license fee prescribed by the ordinance is arbitrary, unreasonable and prohibitory and deprives the prosecutors, and each of them, of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and the Constitution and laws of New Jersey.

(c) The ordinance, in effect, provides for a tax upon the property of the prosecutors, and each of them, and denies them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(d) The ordinance requires the obtaining of a license and the prepayment of license fee as a condition precedent to the right of prosecutors, or one or some of them, to conduct an instrument of transportation service in interstate commerce, in violation of the Commerce Clause of the Constitution of the United States and the Act of Congress to regulate commerce.

(e) The ordinance imposes taxes, regulations, instructions and burdens upon interstate commerce in violation of the Commerce Clause of the Constitution of the United States and the Act of Congress to regulate commerce.

(f) The ordinance takes the private property of the prosecutors, and each of them, for public use without just compensation, in violation of Article I, paragraph 16 of the Constitution of the State of New Jersey.

(g) The ordinance imposes excessive fines and penalties and inflicts unusual punishments, in violation of Article I, paragraph 15, of the Constitution of the State of New Jersey.

(h) The ordinance, in effect, imposes a tax upon property in violation of Article IV, Section VII, paragraph 12 of the Constitution of the State of New Jersey; which provides that property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.

(i) The ordinance is unreasonable and invalid because it confers discretionary power in the governing body of the Township of Saddle River to grant or revoke licenses without specifying uniform rules and regulations to apply to all applicants or licensees.

(j) The ordinance is not within any licensing power of the Township of Saddle River or authorized by law.

(k) The ordinance denies to prosecutors and each of them, the enjoyment of liberty, to acquire and possess property, and to pursue and obtain safety and happiness, in violation of the Constitution and laws of New Jersey.

(l) The ordinance denies to prosecutors and each of them, their privileges and immunities as citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

(m) The ordinance is indefinite and uncertain among other things, as to the amount of license fees and fines and penalties for violations of the ordinance.

(n) The ordinance was passed by the Township Committee of the Township of Saddle River on January 25, 1943, and provides for an annual license fee, payable in advance and that the license shall expire on January first of each year. No license is required by the ordinance for any period prior to January 1, 1944.

2. The ordinance, proceedings and judgments of conviction and the statutes upon which they are based, are for the reasons above stated, or one or more of them, and in other respects, invalid, unlawful, unconstitutional, and illegal."

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20. On January 19, 1945, the New Jersey Supreme Court filed a joint opinion in said actions, in which it set aside said ordinance, and convictions, based on the following, *inter alia*, findings and conclusions (R. 387-392; Reported, 132 N. J. L. 390; true copy attached hereto);

(a) That "For the purposes of this litigation" Independent, the Coal Company and Erie "have been, and will be, treated as one entity" (R. 389).

(b) That the storage-in-transit plant at Coalberg was a public facility provided, at the request of shippers, under the requirements of the Interstate Commerce Act as amended (R. 389).

(c) That "None of this coal is sold at Coalberg, all of it is transported in and out of Coalberg by rail" (R. 390).

(d) That the ordinance was invalid because the stored coal was in reality being taxed by the license fees, whereas it is exempt from taxation; that the stored coal is exempt from taxation because of its character as interstate commerce; and because the ordinance was an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power (R. 391).

(e) That the ordinance was not a reasonable exercise of the police power, but was an arbitrary attempt to raise revenue by discriminating against the business of prosecutors (Appellants here), in the guise of a license fee (R. 391).

(f) That this business was exclusively interstate, and that it did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg (R. 391).

(g) That—

"In the instant case the purpose of the in-transit storage was for the economic reasons stated. Coal-

berg was not its (the coal's) destination. Its journey was simply interrupted for the purpose of storage and not for sale. It being a subject of interstate commerce, it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think was upon the occupation or privilege of carrying on such interstate commerce" (R. 392) (Bracketed words supplied).

21. On January 29, 1945, the New Jersey Supreme Court entered judgments reversing, setting aside, and vacating the judgments of conviction entered by Appellee, William Scheele, Recorder of Saddle River Township, against Independent and James Thompson.

22. Appellees appealed from the judgments of the New Jersey Supreme Court and assigned the following specific "Grounds of Appeal", (identical in the above entitled causes) which involved the question of the validity of said municipal ordinance on the ground of its repugnancy to the Constitution and laws of the United States, as contended by appellants and found by the New Jersey Supreme Court (R. 398-400);

(Grounds of Appeal)

"1. Because the Supreme Court erroneously found and determined that the enactment of the said ordinance was not a reasonable exercise of the police power for the promotion of the public health, safety or welfare but was an arbitrary attempt to raise revenue by discriminating against the business of Prosecutors in the guise of license fees and to thus secure from it a sum equivalent to the tax which would accrue were the property not exempt.

2. Because the Supreme Court erroneously found and determined that the business in which the Prosecutors were engaged in this cause was exclusively interstate.

3. Because the ordinance in question was lawfully enacted for the purpose of raising revenue by the imposition of license fees pursuant to R. S. 40:52-2.

4. Because the ordinance in question established a general classification and prescribed a license fee which was not prohibitory or confiscatory.

5. Because the question of whether the Prosecutors business is within interstate commerce was *res adjudicata.*

6. Because the arrangement existing between Independent Warehouses, Inc., Pennsylvania Coal Company and Erie Railroad Company, relied on as rendering the nature of the business in question in this case, within Interstate Commerce was violative of the Federal Interstate Commerce Act, illegal and contrary to public policy."

23. On January 31, 1946 the New Jersey Court of Errors and Appeals filed its joint opinion in said actions reversing the judgments of the New Jersey Supreme Court and affirming the convictions of Independent and James Thompson. A true copy of that opinion is attached hereto. (References thereto herein are by page numbers thereof.) The New Jersey Court of Errors and Appeals held, *inter alia:*

(a) The statutory authority purported to be exercised in the ordinance in question--

> "involves a license or privilege tax or excise levied for both revenue and regulation under the police power * * *" (Op. p. 2, bottom).

(b) The "specific constitutional limitations applicable to *ad valorem* taxes do not apply to license taxes" (Op. p. 3).

(c) "We are clear that the taxes thus levied do not constitute a direct and undue burden upon and therefore a regulation of interstate commerce in contraven-

tion of *Article I, Sec. VIII, cl.* 3 of the *Federal Constitution*" (Op. p. 4).

(d) "But a tax for the privilege of exercising a corporate franchise within the state is not obnoxious to the commerce clause" (Op. p. 4).

(e) "The inquiry is whether the regulation lays an unconstitutional burden on interstate commerce, or a tax upon an independent local service, preliminary or subsequent to any interstate commerce" (Op. p. 8).

(f) "The determinative question is whether there was a cessation of interstate commerce when the goods were placed in storage at Coalberg for an indefinite period of time; and it must be resolved in the affirmative" (Op. p. 9).

(The applicable tariff prescribed a maximum of two years for the storage-in-transit privilege granted to shippers. Ex. P-12, p. 3, pgf. (*e*); R. 124.)

(g) "And we perceive no force to the contention that the license fee is arbitrary, unreasonable, and prohibitory; and repugnant to the Federal and State constitutional guaranties, in that (1) the license fee is measured on a square foot basis 'without relation to volume of business conducted, tons of coal in storage, or gross or net earnings of the operation'; (2) the fee is fixed 'without relation to the value of the privilege of conducting the business', and is exorbitant; and (3) the fee is in *quantum* such as will 'prevent the conduct of this interstate business within the municipality' " (Op. p. 10).

(h) That the coal in storage was not in transit; that its movement in interstate commerce ended when it arrived at Coalberg for storage; that the Ordinance was valid as applied to the business conducted at Coalberg and to persons employed in said business; and that the coal in storage had a taxable situs, and was taxable as local property, in New Jersey, in the form of "a license or privilege tax or excise

levied for both revenue and regulation under the police power."

(i) The court held that it was not called upon to determine, and expressly refrained from determining, the validity of the penalty and punishment provisions of section 7 (R. 15) of the ordinance, which appellants contended denied them the equal protection of the laws (Reason (c), R. 23) and deprived them of their privileges and immunities as citizens of the United States, in violation of the Fourteenth Amendment of the Constitution of the United States (Reason (1), R. 24). It held:

> "If it be conceded arguendo that the cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and could stand unaffected" (Op. p. 12).

24. On March 7th, 1946, Judgments of reversal of the Judgments of the New Jersey Supreme Court were entered in the New Jersey Court of Errors and Appeals.

25. The storage-in-transit facilities and services of the Erie at Coalberg, were established by tariff provisions (Ex. P. 12, R. 124), effective February 25, 1939 (Ex. P. 4, R. 29-34), as an instrument of the transportation of anthracite coal in interstate commerce, from the mines in Pennsylvania to points in other states, pursuant to provisions of

(a) Section 1, paragraph (3), which defines transportation as including storage, and other, in-transit facilities and services;

(b) Section 1, paragraph (4), which requires the carriers to furnish storage-in-transit facilities and services upon the reasonable request of shippers therefor;

(c) Section 6, paragraph (1), which requires the issuance, and filing with the Interstate Commerce Commission, of

tariffs containing schedules of rates, rules, regulations and practices governing such transportation facilities and services, stating separately all storage charges, all privileges or facilities granted or allowed to shippers and the rules or regulations relating thereto.

(d) Section 6, paragraph (4), which authorizes the carriers to issue and file joint through tariff rates and charges by participating or connecting carriers.

26. The right of the carriers to provide storage-in-transit as part of the transportation facilities and services, and to publish and file tariffs providing rates, rules, regulations and practices governing such facilities and services pursuant to the above mentioned sections of the Interstate Commerce Act, as was done in this case (Ex. P-21, R. 124), and the Public necessity therefor, have been established by many decisions of the Interstate Commerce Commission and the federal courts, including *Elevation Allowances at St. Louis and East St. Louis*, 30 I. C. C. 696; *Elevation Allowances at Kansas City*, 34 I. C. C. 442; *In re Abilene & S. R. Co.*, 148 I. C. C. 316; *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291, 349; *Rates & Charges on Grain and Products*, 91 I. C. C. 105; *Grand R. & I. Ry. Co.* v. *United States*, 222 Fed. 577, 585, Cert. denied 234 U. S. 762; *Blodget Milling Co.* v. *Chicago, M. & St. P. Ry. Co.*, 23 I. C. C. 448; *Central Yellow Pine Assn.* v. *Vicksburg, S. & P. R. Co.*, 10 I. C. C. 193.

27. The storage-in-transit facilities and services of the Erie at Coalberg were established pursuant to the above-mentioned sections of the Interstate Commerce Act, and those facilities and services are available to all shippers, and the regulation of their use and operation, and the tariff rates, rules, regulations and practices applicable thereto, were within the sole jurisdiction of Congress and the Interstate Commerce Commission, and, unless and until said

tariff is suspended or cancelled, or different rates, rules, regulations and practices are prescribed, by order of that commission (which they never were), said tariff rates, rules, regulations and practices constituted the law of the land, and the business of the storage-in-transit of interstate shipments of coal thereunder was a lawful transportation business and service under, and governed solely by, the Interstate Commerce Act, as amended, and subject, only, to the sole and exclusive jurisdiction of the Interstate Commerce Commission, *United States* v. *Wabash R. Co.*, 321 U. S. 403, 413; *Southern Ry.* v. *Reid*, 222 U. S. 424, 440, 441; *Southern R. Co.* v. *Prescott*, 240 U. S. 632, 637; *Cleveland, C., C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, 593-5; *Central R. Co.* v. *United States*, 257 U. S. 247, 257; *Southern Pac. Term. Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 526; *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208.

28. The practice, in this instance, of employing the Coal Company (the owner of the property and equipment) to operate the mechanical equipment (Ex. P-4, R. 29-34), and Independent to function as warehouseman (Ex. P-5, R. 34-39; Ex. P-6, R. 40-45; Ex. P-7, R. 46-51), as agents of Erie solely for the purposes of carrying on the transportation instrumentalities and business of storage-in-transit of interstate shipments of coal under the above-mentioned provisions of the Interstate Commerce Act, and said joint tariff, was entirely valid and lawful. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 506, 513; *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41, 47. *In Railroad Ret. Brd.* v. *Duquesne Warehouse Co.*, 90 Law Ed. Adv. Op. 202; — U. S. —, involving a similar storage-in-transit facility operated, under filed tariffs, for the carrier by a contract agent (pp. 204-206), the court held that the services rendered by the contract agent were services performed "in connection with the transportation of property by rail-

road" (p. 207), and "in connection with the receipt, delivery, storage and handling of property transported by railroad," under the Interstate Commerce Act (p. 204).

29. The New Jersey Court of Errors and Appeals held (Op. p. 4):

> "The regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of the Congress. This control embraces all the instrumentalities by which such commerce may be carried on. And, while a state may possess the power to tax property having a situs within its confines, whether employed in interstate commerce or not, it cannot impose a tax for the privilege of engaging in such commerce."

There is no question that the storage-in-transit facilities and services of the Erie were at Coalberg were instrumentalities by which interstate commerce was carried on, under the requirements and definitions of the above mentioned section 1, paragraphs (1) and (4), of the Interstate Commerce Act, and the construction thereof in the above cited decisions.

30. The crucial difference of opinion between the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals lies in the following conclusions:

(a) The New Jersey Supreme Court held:

> "None of this coal is sold at Coalberg. All of it is transported in and out of Coalberg by rail (R. 3, 90).
>
> "This business is exclusively interstate. It did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg" (R. 391).
>
> "Coalberg was not its (the coal's) destination. Its journey was simply interrupted for the purpose of interstate commerce, it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think is on the

occupation or privilege of carrying on such interstate commerce" (R. 392). (Bracketed words supplied.)

(b) The Court of Errors and Appeals found that the coal is shipped out of storage at Coalberg—

> "to the ultimate destination at the through interstate rate from the point of origin to the new destination, plus reloading charges, 'as a continuance of the original interstate movement', and the balance is paid by the shipper at Coalberg" (Op. p. 7).

That court then held:

> "Thus the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite period, subject to the owner's disposal, and thereby the coal becomes intermingled with the general mass of property having a situs within the State, and subject to the State's dominion and liable to taxation as such, and the stored coal retains that character and status until it is again shipped in interstate commerce" (Op. pp. 7-8).

31. Upon this difference of opinion between the two courts below, depends the question of the validity of this ordinance, and the convictions of Independent and James Thompson thereunder, insofar as appellees' contentions drew in question the validity of said ordinance as repugnant to Article I, Section VIII, clause 3 of the Constitution of the United States and the Interstate Commerce Act, as amended. If the ordinance is held to be an unlawful attempt to license, tax or regulate the storage-in-transit facilities, services or business of Erie at Coalberg, most, if not all, of the errors assigned in the Assignment of Errors filed herewith are valid objections to the decision of the New Jersey Court of Errors and Appeals.

32. The correctness of the conclusions of the New Jersey Supreme Court and the errors of the New Jersey Court

of Errors and Appeals, on the above question of law, are demonstrated by numerous decisions of the federal courts. In *Baltimore & O. R. Co.* v. *United States*, 24 Fed. Supp. 734 (sustaining the Interstate Commerce Commission's decision reported as *Thomas Keery Co. Inc.* v. *New York, O. & W. Ry. Co.*, 226 I. C. C. 335, 345), the court said:

> (p. 735) "A 'transit' is a stop-over privilege granted by a carrier, by which a break de facto in the continuity of carriage of goods is disregarded, and two legs of a journey are treated as though they were covered without interruption. It unites both legs into a 'through route' for which a joint rate can be published."
>
> * * * * * * *
>
> (p. 735) "The reason why such interruptions are held not to break continuity is because the intent of the parties at the outset to unite all parts of the carriage; and that intent * * * is probably the most important single determinant of continuous carriage, and therefore of 'through routes.'"
>
> "Here it is not material to learn where the methanol is going, but only that it is upon some through route which crosses a boundary of New York."

Other parts of that decision on page 736 are particularly pertinent to the facts in these cases. No appeal was taken from that decision. Other decisions to the same effect, including cases involving precisely the same conditions and practices upon which the Court of Errors and Appeals based its findings and conclusions above quoted from pages 7 and 8 of its opinion, are *Wheelock & Bierd* v. *Akron, C. & Y. Ry. Co.*, 179 I. C. C. 517, 520, (citing *Central R. R. Co.* v. *United States*, 257 U. S. 247; and *Grand Rapids & I. Ry. Co.* v. *United States*, 222 Fed. 577); *Texas Steel Co.* v. *Missouri-K-T. R. Co.*, 225 I. C. C. 337, 339; In *B. & O.*

*O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, 171, the Court said:

> "Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement; and hence that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence, or absence, of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic."

33. These cases are not mere tax avoidance cases. All of the property, equipment and facilities at Coalberg were annually assessed and taxed by the Township of Saddle River. For the year 1943 (in which these actions arose) all of the property at Coalberg was assessed against the Coal Company by the Township of Saddle River; land Block 106-D the "Place or premises" involved in these actions, at $20,475; improvements at $113,400. Taxes amounting to $7,770.98 were levied and paid thereon. (Ex. P-2, R. 26.) All property of Erie located in New Jersey, including the franchises under which it operated therein, were regularly assessed by, and paid to, the State under the provisions of Chapters 19 to 29, Title 54, of the Revised Statutes of New Jersey. Section 54: 20-2 of Revised Statutes provides:

> "All property of a railroad * * * company used for railroad * * * purposes shall be assessed and taxed by the state tax commissioner in the manner pro-

vided in chapters 19 to 29 of this title. (Sec. 54:19 et seq), *and the tax so imposed shall be in lieu of all other taxation upon property so subject to taxation.*" (Italics ours.)

Independent and the coal company are foreign corporations authorized to do business in New Jersey under Chapter 15, Title 14, of New Jersey Revised Statutes, and pay franchises taxes on business done in New Jersey, pursuant to Title 54, Chapter 4, Section 19 of the New Jersey Revised statutes. No municipality has authority to levy and collect such taxes. The coal in storage is exempt from taxation under section 54:4-3.20 of New Jersey Revised Statutes, *Pattison & Bowns 1. Township of Saddle River*, 129 N. J. L. 135, aff. 130 N. J. L. 177. Hence, the corporate appellants are regularly taxed for all forms of property, including franchises, which are taxable under the tax laws of New Jersey.

34. These causes involve the very existence of an important instrument of interstate commerce that is in universal, and widespread, use throughout the country, as a commercial and economic necessity and public convenience to the producers, shippers, and consumers, and the distribution, of many commodities, particularly those having seasonal periods of production, transportation or consumption, and for which in-transit storage by carriers, under filed tariffs, is a vital facility of commerce, and sustained supply. A few examples will suffice: Many products of agriculture have seasonal production or limited harvesting periods, but are used throughout the year, including cotton, grain, fruits, vegetables and meat, poultry, butter, eggs and cheese.

Iron ore moving lake-and-rail from mines in Minnesota during the season of open navigation on the lakes to the steel mills in Michigan, Indiana, Ohio, Pennsylvania and

elsewhere, to enable the steel mills to operate the year-round. Anthracite coal is mined throughout the year but has a substantial consumption only during winter months; in order to provide continuous production, and employment for miners; that adequate transportation can be furnished during favorable weather conditions; and that an adequate supply of domestic fuel may be available during winter months when consumption exceeds current mine production. Lumber and steel products are likewise extensively stored in transit. Storage in-transit for various purposes, including processing, enable the application of through routes and rates which materially lessen the cost of transportation to shippers and prices to consumers.

35. Without such accumulations of commodities under storage-in-transit tariffs, at convenient distribution points enroute between sources of supply and ultimate consumption, it would be impossible to provide a steady supply of food, clothing, heat and shelter to areas of dense population, like the New York Metropolitan area with a population of ten million people.

36. If municipalities may tax and regulate the business of furnishing such interstate commerce transportation facilities, and impose substantial license fees (in the cases up to a possible more than $20,000. per year) for one facility, the business could not be conducted without sustaining a staggering additional tax which would, of necessity, increase transportation cost and prices and result in unlawful discrimination among carriers, commodities and communities. If such an ordinance is valid as applied in these cases (as the New Jersey Court of Errors and Appeals has held) not only the carrier, but also each of its officers, agents and employees who "work in, occupy or directly or indirectly in any manner whatsoever utilize the place or premises where the business is conducted, or car-

ried on" (R. 13, 15), is exposed to the hazards of cumulative fines and imprisonments, if their employers should fail to comply with any provision of the ordinance.

37. The grounds of appellants' contest of the validity of said ordinance, and the convictions of appellants, Independent and James Thompson, throughout the course of the litigation in these causes, as set forth in their "Reasons" filed in the New Jersey Supreme Court (R. 22-25) include the following which drew in question the validity of said ordinance on the ground that said ordinance is repugnant to the Constitution and laws of the United States.

(a) That said ordinance as applied, is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it:

(1) Deprived appellants of their property without due process of law (Pgf. (b); R. 22);

(2) Denied them the equal protection of the laws (pgf. (c), R. 23; pgf. (m), R. 24);

(3) Denied to them, and abridged, their privileges and immunities as citizens of the United States (pgf. (i), R. 24; pgf. (1), R. 24);

(b) That said ordinance, as applied, is repugnant to Article I, Section VIII, clause 3, of the Constitution of the United States and the Federal Acts to Regulate Commerce, in that it:

(1) Imposed a license fee or tax for, and as a condition precedent to the right to exercise, the privilege of engaging in interstate commerce (pgf. (d), R. 23);

(2) Imposed a license fee or tax on the privilege of using and operating transportation instrumentalities, facilities and services, and upon property, instrumentalities and

facilities employed, and on property, in interstate commerce (pgf. (a), R. 22; pgf. (d), R. 23; pgf. (j), R. 24);

(3) Imposed undue and unlawful taxes, regulations and burdens upon interstate commerce (pgf. (e); R. 23).

The decision of the New Jersey Court of Errors and Appeals is in favor of the validity of said ordinance, notwithstanding all, or any of the above mentioned contentions of appellants.

38. In addition to the substantial federal questions involving the alleged violation of the Fourteenth Amendment of the Constitution of the United States, the decision and judgments of the New Jersey Court of Errors and Appeals here sought to be reviewed on appeal, involve the substantial federal question of the right of a municipal subdivision of a state to "license and regulate a business" (R. 13) which is exclusively the subject of interstate commerce, and the railroad property, and transportation facilities and services, where that business is established and conducted pursuant, exclusively, to the definitions and requirements of Section 1, paragraphs (3) and (4), and governed by rates, rules, regulations, and practices published in a tariff duly filed with the Interstate Commerce Commission pursuant to the requirements of Section 6, paragraphs (1), (3), (4), (5) and (6), (7) and (10), of the Act to Regulate Commerce (Title 49 USCA).

39. The facts and authorities above set forth demonstrate that, in these cases, there was drawn in question the validity of said municipal ordinance on the ground of its repugnance to the Constitution and laws of the United States as set forth in paragraphs 2 and 3 of the Assignment of Errors filed herewith, and that the decision of the New Jersey Court of Errors and Appeals is in favor of its validity, contrary to Appellants' contentions that said

ordinance, as applied to these cases, violates their rights under the Fourteenth Amendment of the Constitution of the United States, as particularly set forth in paragraph 2 of said Assignment of Errors, and Article 1, Section VIII, clause 3 of the Constitution of the United States and the Acts to Regulate Commerce, as particularly set forth in paragraph 3 of said Assignment of Errors and present substantial grounds of jurisdiction in the Supreme Court of the United States to review said judgments of the New Jersey Court of Errors and Appeals, and to justify, and require, the allowance of the petition of appeal filed herewith.

CLEMENT K. CORBIN,
*Counsel for Appellants,*
*Independent Warehouses, Inc.*
*and James Thompson.*

WILLIAS T. PIERSON and
DUANE E. MINARD,
*Counsel for Appellants,*
*Pennsylvania Coal Company*
*and Erie Railroad Company.*

Dated: March 13, 1946.

## APPENDIX "A"

NEW JERSEY COURT OF ERRORS AND APPEALS

Nos. 4/28 October Term, 1945

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY, and ERIE RAILROAD COMPANY, Prosecutor-Respondents,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and TOWNSHIP OF SADDLE RIVER, in the County of Bergen, Defendants-Appellants.

JAMES THOMPSON, Prosecutor-Respondent,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and TOWNSHIP OF SADDLE RIVER, in the County of Bergen, Defendants-Appellants.

Argued October 16, 1945; decided January 31, 1946.

On appeal from the Supreme Court, whose opinion is reported in 132 N. J. L. 390.

For the appellants: Chandless, Weller & Kramer; Ralph W. Chandless, of counsel.

For the respondents, Independent Warehouses, Inc., and James Thompson: Collins & Corbin.

For the respondents, Pennsylvania Coal Company and Erie Railroad Company; Hobart, Minard & Cooper. Robert J. Bain, Duane E. Minard and G. Addison Hobart, of counsel for respondents.

The opinion of the court was delivered by HEHER, J.

The challenged ordinance provides for the licensing of "the business of the storage of personal property in a warehouse engaged in storing goods for hire," and "the place of premises" in which such business "is conducted or carried on," and levies, admittedly as a revenue measure,

an "annual fee" to be computed "on the basis or rate of three-quarters of a cent for each square foot of the total ground area of the place and premises" devoted to the business; and it is the insistence of respondent that, since this bylaw lays the license fee upon the "place or premises" in which the storage business is carried on, "measured by land areas," it is, in effect, an additional tax "upon the property," and that, at all events, it is in substance a tax laid upon the stored coal "in lieu of personal property taxes" that would be leviable thereon were it not for the exemption granted by R. S. 54:4–3.20, and thus a negation of that legislative policy. If "Perishable goods" are stored upon the licensed premises, the licensee is under a duty to comply with all health regulations "required by any federal, state or municipal authority." He is also enjoined to observe all police and fire regulations laid down by the local "police and fire authorities." And there is provision for inspection of the premises by the local police, fire and health authorities, and a requirement that the storage of "any inflammable or combustible matter" thereon shall be immediately reported to the governing body. Respondents' business is within the exemption category. *Pattison & Bowns, Inc.* v. *Township of Saddle River*, 129 N. J. L. 135, *affirmed* 130 N. J. L. 177. We find these points to be devoid of substance.

The ordinance was enacted in the purported exercise of the power conferred by *R. S. 40:52-1(g) and 40:52-2*: and these provisions and *sec. 54:4-3.20, supra*, are mutually exclusive. The former involves a license or privilege tax or excise levied for both revenue and regulation under the police power, while the latter section has reference to a property tax merely. The levies may coexist, if such be the legislative intention; and this is the case here. *Sec. 54:4-3.20* plainly confines the exemption to property taxes, i. e. "personal property stored in a warehouse" of one "engaged in the business of storing goods for hire."

License is a means of regulating and taxing privileges and occupations and the use and disposal of property. The exactions thereby made do not take the category of an *ad valorem* property tax. License and property taxes cover

separate and distinct areas of the local taxing power; and they have radically different attributes. *Jersey City* v. *Martin*, 126 N. J. L. 353. See, also *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 695, 65 L. Ed. 1139. The one is a tax upon the business of the warehouseman; the other is a direct tax upon the property of third persons stored in the warehouse. And the exercise of the latter power is confined by specific constitutional limitations which do not apply to the former. There is no suggestion of a legislative purport to render the storage and warehouse business immune from the tax for revenue and regulation permissible under the cited licensing statute. The frame of the statutes is not consistent with the theory of an all-inclusive exemption from taxes of both classes. The contention *contra* necessarily proceeds upon the hypothesis that, prior to the adoption of the exemption statute, the *ad valorem* property tax was exclusive of all license taxes and excises; and this proposition is obviously untenable. The argument of competitive disadvantage is one to be addressed to the legislative forum.

But the exercise of the licensing power cannot exceed the bounds of reason. The law will not suffer confiscation and oppression under the guise of taxation. The quantum of the tax rests in sound discretion, guided by reason; and judicial intervention is justifiable only where there has been an abuse of the power. If the local legislation action is not clearly unreasonable or unduly oppressive or discriminatory, its policy is not a justiciable question. *The Great A. & P. Tea Co., Inc.* v. *Camden*, 122 N. J. L. 47; *Giant Tiger Corporation* v. *Camden*, 122 N. J. L. 240; *American Grocery Co.* v. *Board of Commissioners of New Brunswick*, 124 N. J. L. 293; *Durland* v. *Kearney*, 128 N. J. L. 22.

And we are clear that the taxes thus levied do not constitute a direct and undue burden upon and therefore a regulation of interstate commerce in contravention of *Article I. sec. VIII, cl. 3 of the Federal Constitution.*

The regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of the Congress. This control embraces all the instrumentalities by which

such commerce may be carried on. And, while a state possesses the power to tax property having a situs within its confines, whether employed in interstate commerce or not, it cannot impose a tax for the privilege of engaging in such commerce. *Helson v. Commonwealth of Kentucky*, 279 U. S. 245, 49 S. Ct. 279, 73 L. Ed. 683; *Sprout v. South Bend*, 277 U. S. 163, 48 S. Ct. 502, 72 L. Ed. 833; *McCall v. People of California*, 136 U. S. 104, 10 S. Ct. 881, 34 L. Ed. 391. But a tax for the privilege of exercising a corporate franchise within the state is not obnoxious to the commerce clause. A tax measured by net profits earned within the state is valid; even though these profits may have been derived in part, or indeed mainly, from interstate commerce. A franchise is deemed a part of the corporate property lawfully taxable in the state. *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 S. Ct., 45, 65 L. Ed. 165; *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135; *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 38 S. Ct. 444, 62 L. Ed. 1025. The tax levy here is not of the prescribed class.

The essential facts are not in dispute. The storage plant, commonly known as "Coalberg," is owned by the Pennsylvania Coal Company, a Pennsylvania corporation. It comprises 67¼ acres of land and buildings, tracks, chutes, hoppers, scales, machinery and equipment. The owner leased the yard in its entirety to Independent Warehouses, Inc., a New York corporation, at the nominal annual rental of one dollar. These corporations are wholly owned subsidiaries of the Erie Railroad Company, a common carrier in interstate commerce; and under agreements between these parties, the plant is operated by the Pennsylvania Company "for the benefit and on behalf of," and at the sole expense of the Erie Company's trustees, "as a public service facility for shippers of prepared anthracite coal on Erie lines desiring storage space in accordance with and under the rates named in a certain tariff on file with the Interstate Commerce Commission and the Public Utilities Commission of the State of New Jersey, issued January 24, 1939," and any supplements thereto. The Erie's trustees agreed to maintain an agent at the yard authorized on their behalf to issue warehouse receipts for coal placed therein "for storage by

shippers." The Pennsylvania Company undertook to remit to the trustees, monthly, the net operating surplus; and the trustees assumed the obligation of reimbursement for the net operating loss, if any. By express provisions, "taxes are includable in the "allowable items of expense chargeable against" operation and maintenance. By this arrangement, the Erie's trustees sought to avert the diversion "of shipments of coal * * * to other competing lines on which facilities for coal storage are available."

The agreement with Independent Warehouses, Inc. recites that it was "the desire and for the interest" of the Pennsylvania Company that the lessee should conduct upon the premises the "general business of a warehouseman," and provides that the lessee shall devote the yard to such purposes, and shall furnish storage therein for "any and all types of coal * * * tendered to it for warehousing for the account or at the request of "the Pennsylvania Company (if there shall be available storage space) at the rate of two cents per ton, with a minimum annual charge of $600. There was also a provision for reimbursement of the lessee for its losses, costs and expenses not classable as "ordinary." By a supplemental agreement, the storage rate was reduced to one-half cent per ton, and the annual minimum charge to $500. The New York, Susquehanna and Western Railroad Company has certain contractual trackage rights at the yard, and the use of other facilities. Independent Warehouses, Inc., is engaged in the public warehouse business "at various places in nine states." For some 15 years prior to the agreement with the Pennsylvania Company, Independent had issued warehouse receipts for coal stored in this yard.

The Pennsylvania Company owns and operates anthracite coal mines in the State of Pennsylvania. Coal sold at the mines is, by contract with the purchaser, shipped in interstate commerce over the railroad of the Erie Company, and stored at the Coalberg yard until, at the shipper's direction, it is again conveyed by rail to its ultimate destination. For the in-transit storage, including unloading, reloading, and the incidental services, the shipper pays to the carrier a tariff charge of 28¢ per ton. Free storage is permissable for as long as two years. This storage is designed to meet

seasonable deficiencies and shortages due to the excess of consumption over production, and to facilitate the financing of purchases through negotiable warehouse receipts, all of which, it is said advance the general welfare as well as serve the particular interests of the mine operators, shippers and carriers. Erie's Coal Freight Agent testified that, when because of seasonal conditions the supply exceeds the demand, "the operators bill" coal "to storage, to store it at an advantageous point for reshipment;" that "the shipper hasn't enough orders to ship it out directly to destination;" that all the coal "is consigned to Coalberg, Rochelle Park, for storage, billed at the regular tariff rates from the mine to the storage plant," and "it is held there awaiting orders from the consignee as to what is to happen to it." This course "relieves the car situation," and it "also helps the operator to continue operating."

There is an established tariff charge for the storage; and the argument, in brief, is that through the "contract agencies" of the Pennsylvania Company, as the owner of the plant, and Independent, as "a public warehouseman," the Erie Company "utilizes" these facilities "solely to provide regular tariff in-transit services to its shippers for interstate shipments of coal from the Pennsylvania mines to ultimate destinations through, and beyond, Coalberg, with the facilities provided by the storage of the coal with a public warehouseman, as a regular transportation service facility over its line, pursuant to the demands of shippers;" and that the "tariff charges for this in-transit service are collected by the carriers directly from the shippers, and Erie, and participating carriers, bear the entire expense of the transit facilities."

But the coal is shipped to the purchaser or his consignee at Coalberg, Rochelle Park, and freight charges are collected at the rate prescribed for transportation from the mines to that particular point, plus storage and unloading charges; and, when the coal is reshipped, there is, as we have seen, a new billing to the ultimate destination at the through interstate rate from the point or origin to the new destination, plus reloading charges, "as a continuance of the original interstate movement," and the balance is paid by the shipper at Coalberg. The ultimate is not deter-

mined until the owner gives shipping instructions. Compare *Federal Compress & W. Co. v. McLean*, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622.

Thus the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite period, subject to the owner's disposal and thereby the coal becomes intermingled with the general mass of property having a situs within the State, and subject to the State's dominion and liable to taxation as such; and the stored coal retains that character and status until it is again shipped in interstate commerce. It does not become the subject of carriage in interstate commerce by reason of its conveyance by rail from Coalberg to other points in New Jersey. The inquiry is whether the regulation lays an unconstitutional burden on interstate commerce, or a tax upon an independent local service, preliminary or subsequent to any interstate transportation. *People of New York, ex rel. Pennsylvania Railroad Co. v. Knight*, 192 U. S. 21, 24 S. Ct. 202, 48 L. Ed. 325; *McGoldrick v. Berwind-White Coal Min. Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565. The question ofttimes is one of remoteness and degree: The tax may be too remote and incidential to constitute a burden on the transaction of the commerce between the states. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 S. Ct. 532, 41 L. Ed. 953. A tax that only indirectly affects the profits or returns from interstate commerce is not within the ban of the commerce clause. *United States Glue Co. v. Oak Creek, supra.*

Property actually in transit in interstate commerce is exempt from local taxation. But if property be stored "for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities." *Kelly v. Rhoads*, 188 U. S. 1, 23 S. Ct. 259, 47 L. Ed. 359. There, Mr. Justice Brown found that the earlier cases declared the principle to be that, "while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it is actually in transit to another state, it becomes the subject of interstate com-

merce and is exempt from local assessment." If there was a cessation of interstate commerce the goods became subject to the jurisdiction of the state of their situs. Actual transit is the determinant. Here movement in interstate commerce had ceased when the storage for an indefinite period began; and the coal then came within the dominion and protection of the state. As in the case of *Susquehanna Coal Co. v. South Amboy*, 76 N. J. L. 412, affirmed 77 N. J. L. 798, there was something more than an incidental interruption of the continuity of the transportation through the state. On a bill in equity to restrain the collection of taxes levied in that case, the Federal Supreme Court expounded the principle that, even though the delay in interstate transportation was but temporary, if it was availed of for "a business purpose and advantage," the commodity during that particular period "secured the protection of the state," and it was therefore subject to local taxation. *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 35 S. Ct. 712, 57 L. Ed. 1015.

The case of *Lehigh and Wilkes-Barre Coal Co. v. Junction*, 75 N. J. L. 68, affirmed *Ibid.* 922, is to the same effect. It does not matter that there the goods were owned by the carrier. That does not serve to vary the application of the principle. The determinative question is whether there was a cessation of interstate commerce when the goods were placed in storage at Coalberg for an indefinite period of time; and it must be resolved in the affirmative. To borrow the language of Mr. Justice McKenna in the case of *General Oil Co. v. Crain*, 209 U. S. 211, 28 S. Ct. 475, 52 L. Ed. 754, the coal "required storage there,—the maintenance of the means of storage; of putting it in and taking it from storage." See, also, *State, Detmold and Cox, Pros., v. Engle*, 34 N. J. L. 425; *State, Lehigh & W. Coal Co., Pros., v. Carrigan*, 39 N. J. L. 35.

It is also urged that the Erie Company "and its agents" conduct "a common carrier public service facility for the transportation and in-transit storage of coal at Coalberg, under franchises and authority conferred" by the State of New Jersey, and it therefore cannot be required "to obtain a municipal license for the privilege of exercising its franchise."

Obviously, the franchise grant to the railroad company do not render immune from regulation and taxation under *sec. 40:52-1(g)* and *40:52-2, supra,* a public warehouse business conducted by another, even though the operator be one of its corporate subsidiaries. The question is essentially one of legislative intention; and there is no indication whatever of a purpose to exempt a public warehouse of this category from the operation of the cited statute, simply because the railroad company uses the facility for what it terms in-transit storage after the movement in commerce has come to an end.

And we perceive no force to the contention that the license fee is arbitrary, unreasonable and prohibitory, and repugnant to Federal and State constitutional guaranties, in that (1) the license fee is measured on a square foot basis "without relation to volume of business conducted, tons of coal in storage, or gross or net earnings of the operations;" (2) the fee is fixed "without relation to the value of the privilege of conducting the business," and is exorbitant; and (3) the fee is in *quantum* such as will "prevent the conduct of this interstate business within the municipality."

A tax on a public warehouse graduated according to storage capacity is familiar legislative practice. *Vide Federal Compress & W. Co. v. McLean, supra.* The license has reference only to the public warehouse business transacted at the warehouseman's established place of business within the State. *W. W. Cargill Co. v. Minnesota,* 180 U. S. 452, 21 S. Ct. 423, 45 L. Ed. 619. And under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax. There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here. There is not much disparity between the "value of the privilege" and the levy as would render the ordinance arbitrary and discriminatory. The parties are in disagreement as to the *quantum* of the tax upon the stored coal per ton. Based upon respondents' estimate of total plant area and capacity, the tax per ton would amount to 2¼¢ while the personal property tax would range between 29¢ and 58¢ per ton. From 1903 to 1940, when tax

exemption was claimed under *sec. 54:4-3.20*, the plant was successfully managed notwithstanding that property taxes were paid on the stored coal in an amount not less than the current license tax.

And there is no merit in the contention that the municipality does not possess power under the cited enabling act "to penalize an employee because his employer fails to comply with a licensing ordinance," and therefore the conviction of the individual respondent Thompson, cannot be sustained.

Under the ordinance, no person, firm or corporation may "work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises" in which the storage business is conducted without the license therein prescribed. This is the offense of which Thompson was convicted. It was within the competency of the local legislative body to render this a punishable offense, essential to the enforcement of the policy of the ordinance; the power is an integral part of the general grant of authority to license and regulate contained in *sec. 40:52-1, 40:52-1(g) and 40:52-2, supra.*

Lastly, it is said that the ordinance imposes excessive fines and penalties in contravention of *Article I, par. 15, of the State Constitution.*

The penalty prescribed for a violation of the ordinance is imprisonment for a term not exceeding 90 days, or a fine not exceeding $200, or both, with an additional provision that each day during which a violation "shall continue shall constitute a separate offense;" that the magistrate may, in his discretion, imprison one so convicted for a term of not exceeding 90 days, "in default of the payment of any fine;" and that execution may issue against goods and chattels to recover an unpaid fine.

We are not called upon to determine the validity of all these sanctions. A fine of $200 was the penalty imposed upon each of the convicted respondents, Independent Warehouses, Inc. and Thompson; and a fine in this amount coupled with imprisonment for 90 days cannot reasonably be deemed excessive in constitutional intendment. Vid., *R. S. 40:49-5.* The ordinance contains a provision that in case "any section or part" thereof shall be held illegal or

unconstitutional, such invalidity "shall not be construed as impairing the force and effect of the remainder of the ordinance." If it be conceded arguendo that the cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and would stand unaffected.

The judgments of the Supreme Court are accordingly reversed, and the judgments of conviction are affirmed.

*Check list* (in both cases)

For Reversal—Chancellor, Chief Justice, Parker, Donges, Heher, Perskie, Colie, Oliphant, Rafferty, Freund, McGeehan (11).

For Affirmance—Wells, Dill (2).

## APPENDIX "B"

NEW JERSEY SUPREME COURT, OCTOBER TERM, 1944

(Reported, 132 N. J. L. 390)

No. 243/244

INDEPENDENT WAREHOUSES, INC., a Corporation of the State of New York, and Pennsylvania Coal Company, a Corporation of the Commonwealth of Pennsylvania, and Erie Railroad Company, a Corporation of the State of New York, Intervening Parties, Prosecutors,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants

JAMES THOMPSON, Prosecutor,

vs.

WILLIAM SCHEELE, Recorder of the Township of Saddle River, and the Township of Saddle River, a Municipal Corporation of the State of New Jersey, Defendants

Argued October 4, 1944. Decided January 19, 1945.

On certiorari

Before Justices Case, Bodine and Porter

For prosecutors, Independent Warehouses, Inc. and James Thompson: Collins & Corbin; Robert J. Bain, of Counsel.

For prosecutors, Pennsylvania Coal Company and Erie Railroad Company: Hobart, Minard & Cooper; Duane E. Minard and G. Addison Hobart, of Counsel.

For the defendants: Chandless, Weller & Kramer; Ralph W. Chandless of Counsel.

The opinion of the Court was delivered by Porter, J.

The writs of certiorari in these two cases bring before us for review the convictions of the prosecutors, Independent

Warehouses, Inc. and James Thompson, its employee, for violation of Section I of an ordinance of the defendant municipality on charge of storing coal in a warehouse without having first obtained a license therefor. The ordinance in question provides for the licensing of the business of conducting the storage of personal property in a warehouse for hire and provides a penalty for violation of the said ordinance of imprisonment not exceeding ninety days or a fine not exceeding $200.00, or both. It is not denied that Independent Warehouses, Inc. was operating such a business on premises within the municipality at storage yards commonly called Coalberg and that Thompson was employed by it.

Independent Warehouses, Inc. is a corporation of New York, authorized to do business in New Jersey, and is engaged in storing goods for hire in ten states, including the warehouse at the Coalberg plant. It has operated this plant since June 20, 1939 in the storage of coal shipped in interstate commerce, for the benefit of and at the expense of Erie Railroad Company, and has shipped over that road exclusively as an in-transit facility for interstate shipments of coal.

The Pennsylvania Coal Company is a corporation of Pennsylvania where it mines and sells anthracite coal. It holds title to the Coalberg property.

The Erie Railroad Company is a common carrier by railroad engaged in interstate commerce. Independent Warehouses, Inc. and Pennsylvania Coal Company are subsidiary corporations of Erie Railroad Company, the capital stock in both corporations being wholly owned by it. The Pennsylvania Coal Company and Erie Railroad Company were allowed to intervene in these proceedings. For the purpose of this litigation they have been, and will be, treated as one entity.

It is the practice of the prosecutors to store large quantities of anthracite coal in their yard at Coalberg in the defendant municipality. This yard has a capacity of storing about 400,000 tons of coal. It is convenient, if not indeed necessary, in marketing this coal and transporting it to the ultimate consignee to have a place of storage in which to accumulate it during the slack season, it not being possible

or practical to deliver it directly from the mines at the peak season of its need by the consumer.

The proofs show that the Erie Railroad Company and Pennsylvania Coal Company have entered into a written contract which provides that coal be shipped to and stored at Coalberg as a public facility for in-transit storage of coal under railroad tariffs under supervision of an Erie agent stationed at Coalberg, who collects freight and storage charges. The purpose of this arrangement is to provide a reserve supply of coal in large quantities produced in slack season and made available when needed in the winter season and to facilitate the financing of the purchase when desired by negotiation of warehouse receipts. It also appears that shippers of coal require these facilities, that it is necessary for carriers to provide them and that the Federal Act to Regulate Commerce provides that they be furnished by the carriers upon reasonable request of shippers. The fact with respect to this coal is that it is all owned by shippers or consignees and is shipped in interstate commerce from the mines in Pennsylvania to the ultimate destination in, or beyond, the New York metropolitan area with in-transit stop-over privileges at Coalberg. None of this coal is sold at Coalberg. All of it is transported in and out of Coalberg by rail.

The controversy between these parties is over the right of the municipality to levy taxes on this coal. This yard is operated as a warehouse, and the taxation of the coal was set aside by this court and our opinion was affirmed by the Court of Errors and Appeals in *Pattison & Bowns, Inc. v. Saddle River Township* in 129 N. J. L. 135, aff'd. 130 Id. 177. It was there held that coal stored in fenced-in piles on an otherwise open tract of land equipped with machinery to handle the same is within the purview of R. S. 54:4-3.20 (exempting from taxation goods stored in warehouse.)

The attempt was then made to accomplish the same result by the adoption of the ordinance under which the prosecutors were convicted. This ordinance provides for the licensing of warehouses and fixing the license fee at 3/4 of a cent per square foot of storage space. It appears that the space occupied by stored coal in this warehouse on that basis of licensing fees would bring in a revenue of

about $11,000. a year, a sum approximately equivalent to the amount of the tax previously and unsuccessfully levied on the coal.

The prosecutors raise many questions in their attack on the legality of this ordinance, the principal ones being that the coal in reality is being taxed by the license fees, whereas it is exempt from taxation, because it is in warehouse as held by the *Pattison & Bowns* case, *supra;* also it is exempt from taxation because of its character as interstate commerce, also because of an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power.

We think these arguments are well made and that the ordinance is invalid. The prosecutors were engaged in a legitimate business, and it seems to us that the enactment of this ordinance was not a reasonable exercise of the police power for the promotion of public health, safety or general welfare but was an arbitrary attempt to raise revenue by discriminating against the business of prosecutors in the guise of license fees, and to thus secure from it a sum equivalent to taxes which would accrue, were the property not exempt. Compare *Resciniti* v. *Board of Commissioners of Belleville*, 117 N. J. L. 1; *Vassallo* v. *Orange*, 125 N. J. L. 419; *N. J. Good Humor, Inc.*, v. *Bradley Beach*, 124 N. J. L. 162; *Gurland* v. *Kearny*, 128 N. J. L. 22; *Passaic* v. *Paterson Bill Posting Co.*, 72 N. J. L. 285; *O'Mealia Outdoor Advertising Co.* v. *Rutherford*, 128 N. J. L. 58; *The Great A. & P. Tea Co., Inc.*, v. *Camden*, 122 N. J. L. 47; *Grant Tiger-Corp.* v. *Camden*, 122 N. J. L. 240; *American Grocery Co.* v. *New Brunswick*, 124 N. J. L. 293, aff'd. 126 Id. 367.

This business was exclusively interstate. It did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg. The facts in the instant case distinguish it from *Lehigh & Wilkesbarre Coal Co.* v. *Junction*, 75 N. J. L. 68, aff'd. 75 Id. 922. In this case the taxation of coal was sustained because the coal was not subject to interstate commerce, as its destination was in the state where the tax was levied. It was stored here indefinitely until sold. In the instant case the purpose of the in-transit storage was for the economic reasons stated. Coalberg was not its destination. Its journey was simply

interrupted for the purpose of storage and not for sale. It being a subject of interstate commerce it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think was upon the occupation or privilege of carrying on such interstate commerce. Compare *Erie Railway Co.* v. *The State*, 31 N. J. L. 531; *West Jersey & Seashore Railroad Co.* v. *Lake & Risley Co.*, 105 N. J. L. 314; *United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208; *New Jersey Bell Telephone Co.* v. *State Board of Taxes & Assessments*, 280 U. S. 338.

For these reasons the ordinance will be set aside, and the convictions under review will be reversed.